MOHD HAZRIN MD SARI

v.

PP

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[CRIMINAL APPLICATION NO: 45-7-2001]
22 AUGUST 2002

CRIMINAL PROCEDURE: *Trial - Cautioned statement - Whether accused had a right to a certified copy of his first cautioned statement not admitted in evidence - Whether copy was essential to accused - Whether accused had a direct and tangible interest in it - Whether statement was not a cautioned statement as caution was administered much later - Whether admissibility of statement irrelevant at this stage of trial - Whether prosecution's intention not to tender cautioned statement in evidence irrelevant - Specific Relief 1950, s. 44(1) - Evidence Act 1950, ss. 74(a)(iii), 76, 151 - Dangerous Drugs Act 1952, ss. 37A, 39B - Criminal Procedure Code, s. 113*

EVIDENCE: *Statement - Cautioned statement - Whether accused had a right to a certified copy of his first cautioned statement not admitted in evidence - Whether copy was essential to accused - Whether accused had a direct and tangible interest in it - Whether statement was not a cautioned statement as caution was administered much later - Whether admissibility of statement irrelevant at this stage of trial - Whether prosecution's intention not to tender cautioned statement in evidence irrelevant - Specific Relief 1950, s. 44(1) - Evidence Act 1950, ss. 74(a)(iii), 76, 151 - Dangerous Drugs Act 1952, ss. 37A, 39B - Criminal Procedure Code, s. 113*

The accused was charged for an offence under s. 39B of the Dangerous Drugs Act 1952 ('DDA') and a cautioned statement was recorded from the accused. Apart from this cautioned statement, the accused had made an earlier cautioned statement ('first cautioned statement') before being charged and whilst in police custody to one Inspector Khairul Azhar under s. 37A DDA. The accused now applied for an order pursuant to s. 44(1) of the Specific Relief Act 1950 that the respondent ('the DPP') supply to the accused a certified true copy of that first cautioned statement.

The issues were: (1) whether the accused had a right to inspect and to be supplied with a true copy of the first cautioned statement on payment of the necessary fees; (2) whether the first cautioned statement was in fact not a

cautioned statement as the caution was administered much later; (3) whether the first cautioned statement was inadmissible; and (4) whether the question of supplying the first cautioned statement to the accused did not arise since the prosecution had no intention of tendering it as part of its case.

Held:

[1] Inspector Khairul Azhar was under a duty to record the first cautioned statement pursuant to s. 37A DDA since he was a police officer of the rank of Inspector. Therefore, the first cautioned statement was a public document as defined in s. 74(a)(iii) Evidence Act 1950 being the act of a public officer who was under a duty to record it. The applicant had a direct and tangible interest in the first cautioned statement because he had been charged in court. It followed, therefore, that he had a right to inspect it and to be supplied with a certificate copy thereof upon payment of the necessary fees before the commencement of the trial pursuant to s. 76 Evidence Act 1950. (p 207 f-h)

[2] The applicant required a copy of the first cautioned statement to prepare his defence. The applicant would not be in a position to decide whether to tender the statement as part of his defence if he had no opportunity of studying its contents. Therefore, it was indeed essential to the applicant to be supplied with a copy of the first cautioned statement. (p 208 g)

[3] A statement recorded under s. 37A DDA, unlike a police report lodged by a police officer, is similar to a statement recorded under s. 113 Criminal Procedure Code because both sections provide for the administering to the maker of the statement of a caution before the recording of the statement. If there is no time to caution him before he made the statement, the caution shall be administered to him as soon as possible after the making of the statement. (pp 208 h & 209 a)

[4] The question of the inadmissibility of the first cautioned statement is only relevant if the statement is manifestly inadmissible. But that was not the case here. That the statement was inadmissible because the caution was only administered very much later after the statement was recorded was premature at this stage because the prosecution had not sought to tender it as part of the prosecution's case. The issue of the admissibility or otherwise of the first cautioned statement would only arise for the determination of this court in the event the prosecution sought to tender it as part of the prosecution's case. (p 209 b-c)

[5] It was sufficient that the statement was recorded from the applicant whilst in police custody irrespective of whether it was a cautioned or uncautioned statement. This is because under s. 157 Evidence Act 1950 a former written statement of a witness may be proved to corroborate his later testimony relating to the same fact at or about the time when the fact took place. (p 209 d)

[6] Since the affidavit evidence by the DPP showed that the first cautioned statement was recorded from the applicant at the time of his detention by the police and that he was charged and was being tried for an offence under s. 39B DDA, the court was satisfied that the applicant was directly and substantially interested in his statement in order to enable him to prepare his defence. (p 209 e)

[Application allowed.]

Case(s) referred to:

Hj Abdul Ghani Ishak v. PP [1980] 2 MLJ 196 ***(foll)***
Khoo Siew Bee & Anor v. Ketua Polis Kuala Lumpur [1979] 2 MLJ 49 ***(foll)***
PP v. Ramasami Simmathri & Ors And Another Application (No 2) [2001] 4 CLJ 690 ***(foll)***
PP v. Roslim Harun [1993] 3 CLJ 505 ***(dist)***
PP v. Tan Seow Chuan [1985] 1 MLJ 318 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 112, 113
Dangerous Drugs Act 1952, ss. 37A(1)(b), 39B, 41A(1)
Evidence Act 1950, ss. 74(a)(iii), 157
Specific Relief Act 1950, s. 44(1)

For the prosecution/respondent - Adnan Hj Aziz DPP
For the accused/applicant - Anthonysamy Selvanaikam (M Athimulan); M/s Aziz Anthony & Co

Reported by Usha Thiagarajah

JUDGMENT

Su Geok Yiam JC:

Enclosure (8) is an application *vide* notice of motion dated 20 August 2002 supported by an affidavit of Mr. Anthonysamy a/l Selvanaikam affirmed on the same date for an order pursuant to s. 44(1) of the Specific Relief Act 1950 (Act 137) that the respondent supply to the applicant a certified true copy of a statement which was recorded from the applicant at night on 28 December 1999 at the Sungai Dua Tol Plaza, Butterworth.

The applicant was first charged in the Butterworth Magistrate's Court on 11 January 2000 with a drug trafficking offence under s. 39B of the Dangerous Drugs Act No. 234 of 1952 (as amended in 1980 and 1986) (hereafter referred to as "the DDA") allegedly committed on 28 December 1999 at 9.44pm at the Sungai Dua Tol Plaza, Butterworth.

Before being charged and while he was detained by the police on 20 December 1999 at the Sungai Dua Tol Plaza, Butterworth, the applicant had made a "cautioned statement" to a police officer, namely, one Inspector Khairul Azhar under s. 37A of the DDA.

On 19 March 2000 upon the tender by the prosecution of a requisition under s. 41A(1) of the DDA, the learned magistrate transferred the case to the High Court.

On 23 August 2001, the case was mentioned for the very first time in this court and fixed for hearing on 15 to 18 January 2002 and 22 to 24 January 2002.

On the same date, ie, 23 August 2001, his counsel, Mr. Anthonysamy a/l Selvanaikam, immediately wrote to the learned Deputy Public Prosecutor at the Penang State Legal Adviser's office. In this letter Mr. Anthonysamy stated that they were informed that apart from a "cautioned statement" which was recorded from the applicant by Inspector Zulhazi Zulkafli on 30 December 1999, there was another "cautioned statement" which was also recorded from the applicant by Inspector Khairul Azhar on 28 December 1999. Mr. Anthonysamy requested that they be supplied with a copy of the "cautioned statement" which was recorded on 28 December 1999 (hereinafter referred to as "the first cautioned statement") as soon as possible in view of the case against the applicant having been fixed for hearing on 15 to 18 January and 22 to 24 January 2002.

When he did not get any response from the learned DPP to his letter dated 23 August 2001, Mr. Anthonysamy sent two reminders dated 9 November 2001 and 27 December 2001, respectively.

On 19 June 2002 the case was mentioned and fresh hearing dates were given, ie, 20 to 23 August 2002 and 27 to 30 August 2002.

On 20 August 2002, Mr. M. Athimulan who appeared together with Mr. Anthonysamy for the accused made an oral application to the court for an order that the learned DPP supply them a copy of the first cautioned statement.

The learned DPP objected to the application by the defence counsel. The court then ordered that a formal application be filed so that the relevant facts could be set out in a supporting affidavit and the learned DPP could also file an affidavit in reply if he deemed it necessary.

Thus encl. (8) was filed on the same day. The applicant in this application is the accused in the case. On 21 August 2002 I heard oral submissions. On behalf of the applicant, Mr. M. Athimulan has relied on the Federal Court case of *Khoo Siew Bee & Anor v. Ketua Polis Kuala Lumpur* [1979] 2 MLJ 49.

He submits that the accused is interested in the first cautioned statement and has a right to inspect and to be supplied with a certified true copy of it on payment of the necessary fees. This is because it is a public document having been recorded by Inspector Khairul Azhar, a public officer, who has a duty to record it pursuant to s. 37A(1)(b) of DDA and the accused has a direct, tangible and substantial interest in it.

En. Adnan bin Aziz, the learned DPP, submits that the applicant is not entitled to a copy of the statement because although described as a cautioned statement, it is in actual fact not a cautioned statement. The statement was recorded upon the applicant's initial detention without the applicant being cautioned first and that only very much later while still being detained was the caution administered. Further, the statement is inadmissible because the caution that was purportedly administered was not valid as it was not in compliance with the provisions of the law.

He relies on a number of High Court cases. In *Public Prosecutor v. Tan Seow Chuan* [1985] 1 MLJ 318 at p. 323 Peh Swee Chin, J (as he then was) held that a cautioned statement made by the accused in a drug trafficking case was inadmissible because the caution was only administered the following day and by virtue of that the caution had not been administered as soon as possible pursuant to s. 37A of the DDA. The learned DPP submits that in the present case the 1st cautioned statement was three pages long and was merely an ordinary statement which was recorded during police investigations.

In *Public Prosecutor v. Roslim bin Harun* [1993] 3 CLJ 505 Malik Ishak, J held that a copy of a police report made by a police officer could not be supplied to the defence prior to the commencement of the trial because the police report was not a first information report.

In *Public Prosecutor v. Ramasami Simmathri & Ors. and Another Application (No. 2)* [2001] 4 CLJ 690 I had reproduced an excerpt from the Khoo Siew Bee's case which was to the effect that a copy of an accused's cautioned statement recorded under s. 113 of the CPC can only be supplied to the applicant if the prosecution seeks to tender it as part of the prosecution's case in which event the hearing of the case can be adjourned to enable the applicant's counsel to take instructions from the applicant. The learned DPP submits that since the prosecution in the present case has no intention of tendering the statement as part of the prosecution's case the question of supplying a copy of it to the applicant did not arise.

The learned DPP also submits that the case of *Public Prosecutor v. Ramasami Simmathri & Ors. and Another Application (No. 2)* [2001] 4 CLJ 690 can be distinguished because the High Court in that case held that a copy of a s. 112 statement can be supplied to the accused who had made the statement whereas in the present case the statement was not a s. 112 statement.

In reply, Mr. M. Athimulan submits that the case of *Public Prosecutor v. Tan Seow Chuan* [1985] 1 MLJ 318 is distinguishable because in that case the caution was only administered the following day whereas in the present case the caution was administered on the same day. Further it is premature for the learned DPP to say at this stage that the statement is inadmissible when the court has not yet ruled on the admissibility or inadmissibility of the statement. On the issue whether only s. 112 statements can be supplied to the accused persons who gave the statements, Mr. M. Athimulan cites the case of *Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1980] 2 MLJ 196 where Wan Yahya, J held that an accused person is entitled as of right to be supplied with copies of statements made by him whether cautioned or uncautioned.

In my judgment, Inspector Khairul Azhar who recorded the first cautioned statement was under a duty to do so pursuant to s. 37A(1) of the DDA since he was a police officer of the rank of Inspector. Thus, the first cautioned statement is a public document as defined in s. 74(a)(iii) of the Evidence Act 1950 (Act 56) being the act or record of the act of a public officer who is under a duty to record it. The applicant has a direct and tangible interest in it because he has been charged in court. It follows, therefore, that he has a right to inspect it and to be supplied with a certified copy of it upon payment of the necessary fees before the commencement of the trial pursuant to s. 76 of the Evidence Act 1950 (Act 56).

The cases of *Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur* [1979] 2 MLJ 49; *Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1980] 2 MLJ 196; and *Public Prosecutor v. Ramasami Simmathri & Ors. and Another Application (No. 2)* [2001] 4 CLJ 690 are applicable to the facts of the present case. The cases of *Public Prosecutor v. Tan Seow Chuan* [1985] 1 MLJ 318 and *Public Prosecutor v. Roslim bin Harun* [1993] 3 CLJ 505 are distinguishable.

My reasons are as follows:

Although the Federal Court in *Khoo Siew Bee*'s case had made the observation concerning the adjourning of the hearing of the case to enable the prosecutor to supply to the accused a copy of his cautioned statement recorded under s. 113 of the CPC if it seeks to introduce it in evidence, the Federal Court also observed as follows:

> [T]here is also no doubt that if the prosecution elects not to introduce them in evidence, defence counsel may do it, when cross-examining the police officer who recorded the statements and by getting him to produce them in evidence (as defence exhibits) – in which case, again defence counsel would be given copies or an opportunity of making copies and a brief adjournment to take instructions.

Immediately after making the said observation, the Federal Court said as follows:

> But the question is: are the accused entitled to copies before the commencement of the trial?

In deciding the question posed by itself in the affirmative ie, that a copy of the statement should be supplied to the applicant before the commencement of the trial, the Federal Court held that the statement was a public document and that the applicant had an interest in it. Therefore the applicant has a right to inspect it and to a certified copy of it before the trial commenced. The Federal Court thus ordered accordingly.

Here the applicant needs a copy of the first cautioned statement that was recorded under s. 37A of the DDA to prepare his defence. The applicant will not be in a position to decide whether to tender the statement as part of his defence if he has not the opportunity of studying its contents. Therefore it is indeed essential to the applicant to be supplied with a copy of the statement.

A statement recorded under s. 37A of the DDA, unlike a police report lodged by a police officer, is similar to a statement recorded under s. 113 of the CPC because in both sections there is a provision for the administering to the maker

of the statement of a caution before the recording of the statement or if there is no time to caution him before he made the statement the caution shall be administered to him as soon as possible after the making of the statement.

With regard to the question of the inadmissibility of the first cautioned statement which was raised by the learned DPP, in my judgment it is only relevant if the statement is manifestly inadmissible. But that is not the case here. I agree with Mr. M. Athimulan that the learned DPP's contention that the statement is inadmissible because the caution was only administered very much later after the statement was recorded is premature at this stage because the prosecution has not sought to tender it as part of the prosecution's case. The issue of the admissibility or otherwise of the first cautioned statement will only arise for the determination of this court in the event that the prosecution seeks to tender it as part of the prosecution's case.

In my judgment, it is sufficient if the statement was recorded from the applicant by the police while he was in police custody irrespective of whether it is a cautioned or uncautioned statement. This is because under s. 157 of the Evidence Act a former written statement of a witness may be proved to corroborate his later testimony relating to the same fact at or about the time when the fact took place.

In the present case since the affidavit evidence presented by the learned DPP shows that the statement was recorded from the applicant at the time of his detention by the police at the Sungai Dua Tol Plaza, Butterworth and he has been charged and is now being tried in respect of an offence under s. 39B of the DDA allegedly committed by him in respect of his arrest and detention the court is satisfied that the applicant is directly and substantially interested in his statement in order to enable him to prepare his defence.

In the premises, there shall be an order in terms of the motion that the respondent supply to the applicant a certified copy of the first cautioned statement on payment of such fees as may be payable.